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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

In re Marriage of MARYL E.  
GLADSTONE and PAUL R. VIRGA.

MARYL E. GLADSTONE,

Respondent,

v.

PAUL R. VIRGA,

Appellant.

G038352

(Super. Ct. No. 96D004015)

O P I N I O N

Appeal from an order of the Superior Court of Orange County, Josephine Staton Tucker, Judge. Affirmed.

Julie A. Duncan for Appellant.

Law Offices of Marjorie G. Fuller and Marjorie G. Fuller for Respondent.

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Paul R. Virga (father) is the husband and father in a marital dissolution and child custody proceeding. Father was the subject of a police investigation involving troubling conversations with a third-party female. Although the district attorney did not charge father, authorities provided the police report to the family court, which, after hearing, ordered father to undergo sexual interest testing.

Father contends the trial court erred in ordering the testing because he received no notice the court would order the examinations, and the tests violated his constitutional right to privacy. Maryl E. Gladstone (mother) asserts the court ordered the tests pursuant to stipulation, and therefore father has no basis for appeal. Father, in turn, asserts the purported stipulation was never made. Alternatively, he contends any purported stipulation is unenforceable because the parties did not memorialize the agreement in writing and the court failed to enter it into the court minutes.

We conclude father failed to demonstrate the trial court erred. The trial court's order states that a stipulation was made, and it was incumbent upon father to demonstrate there was no record of it. Father, however, failed to include in the record on appeal the minute order for the date the stipulation was purportedly made, or the reporter's transcript from that hearing. Because we presume the trial court acted properly, father's failure to provide an adequate record dictates we affirm the trial court's order.

## I

### FACTUAL AND PROCEDURAL BACKGROUND

Father was the subject of a police investigation involving conversations he had with a third-party female that were, according to father, "manifestly abhorrent, highly embarrassing and inappropriate, and justifiably a cause for great concern." Although the authorities did not charge father, the police provided their report to the court. Following

a hearing held on November 13, 2006, the trial court issued its “Order After Hearing” on December 15, 2006. The court’s ruling was prefaced by the statement: “After receiving an oral stipulation by both parties and their attorneys . . . .” The order provided that father submit to an evaluation by Wesley B. Maram, Ph.D., and that he “complete any directives from Dr. Maram which are reasonable and/or necessary for the completion of the evaluation including, but not limited to, submitting to: [¶] a. The ABEL test. [¶] b. A polygraph test (also referred to as a lie detector test). [¶] c. A penile plethysmograph (PPG) test. [¶] d. The Rorschach test.”

After approximately six days of testimony, the trial court issued a second order on February 7, 2007, awarding mother full physical custody of the child, and granting father monitored visitation. The order found father had the ability to comply with the court’s previous order for evaluation by Maram, but father failed to do so. The order further provided: “[P]rior to [father] filing a request for the modification of the orders contained herein, he must comply with all of the requirements of the Order After Hearing filed with the Court on December 15, 2006. [Father] shall also be required to plead and prove a substantial change in circumstances in the event he requests unmonitored visitation[.]” In addition, the February 7 order attached a copy of the December 15 order.

Father now appeals the February 7 order to the extent it requires him to undergo the PPG and ABEL tests.

## II

### DISCUSSION

The PPG test is a physiological measure of sexual arousal measuring penile engorgement to assess the subject’s sexual arousal in response to sexually explicit images depicting males and females of different ages. (*People v. Grassini* (2003)

113 Cal.App.4th 765, 771, fn. 2.) The PPG test methodology has been described as

follows: The subject is “asked to place the device on his penis and is instructed to become fully aroused, either via self-stimulation or by the presentation of so-called ‘warm-up stimuli,’ in order to derive a baseline against which to compare later erectile measurements. After the individual returns to a state of detumescence, he is presented with various erotic and non-erotic stimuli. He is instructed to let himself become aroused in response to any of the materials that he finds sexually exciting. These stimuli come in one of three modalities — slides, film/video clips, and auditory vignettes — though in some cases different types of stimuli are presented simultaneously. The materials depict individuals of different ages and genders — in some cases even possessing different anatomical features — and portray sexual scenarios involving varying degrees of coercion. The stimuli may be presented for periods of varying length — from mere seconds to four minutes or longer. [¶] . . . In this way, the plethysmograph provides a detailed profile of a person’s sexual desires: his level of attraction to men and/or women, to boys and/or girls of various ages, as well as to different forms of sexual coercion and violence.” (Jason R. Odeschoo, *Of Penology and Perversity: The Use of Penile Plethysmography on Convicted Child Sex Offenders* (2004) 14 Temp. Pol. & Civ. Rts. L.Rev. 1, 9.)

The Abel Assessment for Sexual Interest (ABEL) test is far less intrusive than the PPG test. “The Abel test consists of two parts: (1) a questionnaire focusing on a variety of areas including demographics, sexual interest, social desirability, and the problematic thinking of sex offenders; and (2) a test measuring the visual reaction time to a series of slides that feature various gender and age categories.” (*State v. Spencer* (2007) 339 Mont. 227, 239.)

In his opening brief, father challenges the condition in the February 7 order that he submit to PPG and ABEL tests. He challenges the PPG test on seven grounds: “(1) imposition of the requirement that appellant submit to the PPG test was accomplished in violation of his due process rights; (2) the PPG test is too unreliable to

be proper for any purpose; (3) it violates appellant's constitutional right to privacy; (4) it violates appellant's right to be free of unreasonable searches and seizures; (5) the requirement that he submit to the test is not reasonably related to any legitimate purpose; (6) even if the test does satisfy some legitimate purpose, the testing requirement results in a greater deprivation of liberty and invasion of privacy than is reasonably necessary; and (7) the test itself would violate appellant's personal dignity, his bodily integrity, and his mental and moral integrity." He challenges the ABEL test on the ground that it was ordered without notice, and because the test is used for treatment purposes, and it is inadequate as a diagnostic tool.

Mother, however, asserts that the constitutional issues and other challenges to the tests are not at issue because, as set forth in the December 15 order, father orally stipulated to the ruling. In his reply, father denies stipulating to take the two tests, and denies that any hearing was held on November 13. Father asserts the only legal development occurring on November 13 hearing was a continuance of the case.

Father contends that a stipulation is not enforceable against a party unless it is in writing or entered on the minutes of the court. He relies on Code of Civil Procedure section 283, subdivision (1), which provides: "An attorney and counselor shall have authority: [¶] . . . To bind his client in any of the steps of an action or proceeding by his agreement *filed with the clerk, or entered upon the minutes of the Court, and not otherwise[.]*" (Italics added.) Father concedes, however that courts may also enforce a stipulation if it appears in the reporter's notes. (See *Webster v. Webster* (1932) 216 Cal. 485, 489.) Father asserts the purported oral stipulation in the court's order of December 15, purportedly made on November 13, 2006, was not recorded in the minutes of the court or the reporter's notes.

Although father supplied a docket sheet with his appellant's appendix showing a minute order for November 13, 2006, he did not include the document in his appendix. Mother supplied a respondent's appendix, but it also did not include the

November 13 minute order. We ordered the superior court file, and discovered a November 13, 2006, minute order. Contrary to father's representation, the court held a hearing on the continuing custody trial, from 9:30 a.m., until 4:40 p.m., before continuing the matter to November 15.

The minute order reflects that at one point in the proceedings, the court ordered: "Pursuant to Evidence Code § 730, the Court appoints Dr. Wesley Maram to complete the testing and assessment as described in Dr. Drozd's testimony and to prepare a written report. Said report shall be received into evidence without further foundation. Respondent shall pay the costs of this testing." Although it is unclear what testing the court ordered, we note that Dr. Maram was the doctor assigned to assess father in the disputed order.

The November 13 minute order, however, does not mention a stipulation. But the minute order does list a court reporter for the proceedings, Kim Owen. Thus, father not only failed to include the critical minute order in the record on appeal, but fails to include either (1) a transcript of the proceedings, or (2) a declaration from the reporter that no transcript is available. Although the order is unclear whether all of the matters ordered were included in the stipulation, we are required to presume the court did not err. As the Supreme Court has recognized: "All intendments and presumptions are indulged to support [the judgment] on matters as to which the record is silent, and error must be affirmatively shown." [Citation.] . . . 'It is the burden of the party challenging the [ruling] on appeal to provide an adequate record to assess error. . . .' (*Ketchum v. Moses* (2001) 24 Cal.4th 1122, 1140-1141 (*Ketchum*).)

Thus, it was incumbent on father to provide an adequate record demonstrating error. Given the order challenged included a recital that a stipulation had been reached by the parties and their attorneys, father should have included the minute order and reporters' transcript in his appendix. Even if, however, we were to conclude the order was not sufficiently clear to allow father to anticipate respondent's contention

that father stipulated to the tests, father should have moved to augment the record. (See *Ketchum, supra*, 24 Cal.4th at p. 1141.) Lacking a record affirmatively demonstrating error, we affirm the trial court's order.

As a final matter, we note the only relief father sought in his opening brief was "reversal of the Orders After Hearing to the extent they compel the two tests." In his reply brief, however, father also requested we strike the portion of the trial court's order making compliance with the order a prerequisite to father filing a request for modification of the custody arrangement. We decline to consider this issue. Courts will not consider matters raised for the first time in a reply brief, absent good reason shown for failing to present them earlier. (*Julian v. Hartford Underwriters Ins. Co.* (2005) 35 Cal.4th 747, 761.)

### III

#### DISPOSITION

The order is affirmed. Mother is entitled to her costs of this appeal.

ARONSON, J.

WE CONCUR:

RYLAARSDAM, ACTING P. J.

MOORE, J.